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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GLORIA E. KIRBY, ETC.,

v. *Petitioner,*

OMI CORP., ETC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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January 14, 1991

QUESTIONS PRESENTED

1. Does the federal maritime cause of action for wrongful death created in *Moragne* preempt state wrongful death statutes for deaths occurring on state territorial waters?

2. Does this Court's decision in *Scindia*, requiring a vessel owner to exercise reasonable care for the safety of longshoremen and harbor workers, include the obligation to comply with federal regulations governing the ship's plans and drawings?

3. As left unresolved by the Court's recent denial of certiorari in *Sammiline*, does the vessel owner's obligation under *Scindia* include the responsibility to take reasonable precautions for the safety of longshoremen and harbor workers before the ship is delivered to a shipyard or stevedore?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Gloria E. Kirby, as Personal Representative of the Estate of Roy A. Kirby, Sr., deceased, and the respondent OMI Corp., a New York corporation.

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Supreme Court of the United States

October Term, 1990

GLORIA E. KIRBY, ETC.,

Petitioner,

v.

OMI CORP., ETC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

The petitioner Gloria E. Kirby, as personal representative of the Estate of Roy A. Kirby, deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal, First District, State of Florida, entered in the above-entitled proceeding on May 14, 1990.

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, is reported at 561 So. 2d 666 and 1990 A.M.C. 1795. The order of the United States District Court for the Middle District of Florida finding the defendant's removal petition untimely and remanding the action to state court is reported at 655 F. Supp. 219 and 1987 A.M.C. 2704. The order of the

Circuit Court, Fourth Judicial Circuit, Duval County, Florida, overturning the jury's verdict and granting a renewed motion for directed verdict is reported at 1989 A.M.C. 1079. The order of the Supreme Court of Florida denying discretionary interdistrict conflict review is not reported. The opinions and orders (other than the order remanding to state court) are reprinted in the appendix to this petition.

JURISDICTION

The judgment of the District Court of Appeal, First District, State of Florida, entered on May 14, 1990, affirmed the trial court's entry of a post-trial motion for judgment in accordance with the respondent's motion for directed verdict. The district court of appeal denied timely motions for rehearing and for rehearing en banc on June 15, 1990. Thereafter, on October 18, 1990, the Supreme Court of Florida denied a timely petition for discretionary review of interdistrict conflict. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1984).

STATUTE INVOLVED

33 U.S.C. § 905. Exclusiveness of liability . . .

(b) Negligence of vessel. In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing

stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This maritime wrongful death action is before the Court on petition for certiorari to the District Court of Appeal, First District, State of Florida. The case arises out of the death of Roy A. Kirby, Sr., a shipyard worker who sustained fatal skull fractures and brain injuries when a steel pipe under hydrostatic pressure blew out of a pipe fitting. The jury found that OMI Corp., the owner of the ship aboard which the accident occurred, was guilty of negligence which contributed to cause Mr. Kirby's death. However, following the verdict, the trial court entered judgment for the defendant in accordance with the defendant's renewed motion for directed verdict; and the district court of appeal affirmed.

Mr. Kirby's widow, Gloria Kirby, brought suit against OMI Corp. on behalf of herself, the Kirbys' two minor children, and on behalf of the decedent's estate, alleging that OMI was negligent in furnishing defective plans for modifications to its vessel, the M/V OMI Wabash. Mrs. Kirby contended that her husband's employer, North Florida Shipyard,

modified the vessel according to OMI's plans; and that, after the shipyard installed a pipeline system as specified by these defective plans, the pipeline blew apart when it was hydrostatically tested, killing Mr. Kirby (R.1-4).[1]

The case, which arose out of a maritime-related death, was brought in state court pursuant to the "saving-to-suitors" clause of 28 U.S.C. § 1333 (1949).[2] OMI moved to dismiss the complaint, arguing that, under the facts alleged in the complaint, the defendant could not have breached any duty owed to the decedent (R.12). The trial court denied the motion to dismiss, finding that the plaintiff had properly pled a cause of action for negligence under *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981) (R.39).[3] OMI then answered the complaint, denying that it was negligent (R.40-44). After discovery was substantially completed, OMI moved for summary judgment, contending that the facts as established by the depositions could not give rise to a finding of negligence on the part of OMI. The trial court denied the motion for summary judgment, finding that material factual issues required resolution by a jury (R.127).[4] With the issue of the defendant's liability under federal maritime law thus framed, the case was tried to a state court jury.

The evidence at trial showed that the owner, OMI Corp., undertook certain modifications to its vessel, the M/V OMI

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[1] (R.__) refers to the Record on Appeal; and (T.__) refers to the Trial Transcript.

[2] Although the defendant attempted to remove the case to the United States District Court for the Middle District of Florida on the basis of diversity of citizenship jurisdiction (R.9-11), the action was remanded to state court on the ground that OMI had not timely perfected its removal petition (R.14-24). *Kirby v. OMI Corp.*,655 F.Supp. 219, 1987 A.M.C. 2704 (M.D.Fla. 1987).

[3] Mrs. Kirby also pled a separate count for lack of seaworthiness of the vessel (R.1-4). The defendant's motion to dismiss the unseaworthiness count was granted (R.39).

[4] Different trial judges ruled upon the motion to dismiss and the motion for summary judgment. A third judge presided over the trial.

Wabash. OMI contracted with North Florida Shipyards, Mr. Kirby's employer, to perform these modifications. The owner provided the shipyard with plans and specifications which directed the manner in which the work was to be performed. These plans were defective in that they improperly called for an incorrect type of pipe fitting in a particular location.

The shipyard performed the modifications as required by the plans, including the installation of the wrong pipe fitting. The morning of the explosion, and while the pipe system was already being hydrostatically tested by the shipyard, the owner's representatives discovered the problem. The owner's port engineer then gave verbal orders as to how the pipe system was to be modified.

The owner's port engineer also remained in the location of the changes to supervise the shipyard employee, Mr. Kirby, in making the ordered changes. Ten minutes after the port engineer left the tank where the changes were being performed, the line exploded due to the previously scheduled hydrostatic test (of which Mr. Kirby and the port engineer were unaware). The explosion fatally injured Mr. Kirby.

Mrs. Kirby conceded that her husband's employer, the shipyard, was negligent in failing to cancel the hydrostatic test; but maintained that OMI's negligence also contributed to the fatality in a number of respects. Plaintiff's expert marine engineers testified that the drawings violated United

States Coast Guard regulations (T.84, 157-58)[5], that the drawings furnished to the shipyard by OMI violated acceptable marine engineering practices by specifying the incorrect fitting, rather than a welded connection; that OMI was further negligent in failing to specify proper restraints; that a welded application would have prevented the accident; and that the port engineer's verbal change order on the morning of the accident was inadequate and defective, in that it would not have restrained the pipe from blowing out under pressure (T.57, 78, 301-03, 315-17, 331-32).[6] The engineers concluded that, had the OMI plans properly specified the removal of the fitting and the installation of a welded or flanged and bolted connection between the two pipes, then the explosion would have been prevented (T.57-58, 107, 219). OMI's own Captain of the vessel, who was aboard at the time of the accident,

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[5] According to John Bell, a marine engineer, the OMI drawings did not comply with the applicable U.S. Coast Guard regulations because the drawings failed to provide for the required restraints on the pipe system (T.84, 157-58). *See* 46 C.F.R. § 56.30-40 (1980). Mr. Bell also testified that a series of "general notes" on the OMI drawings were not adequate to alert the shipyard to the dangerous condition created by use of the fitting to connect unrestrained pipes; nor were the general notes adequate to bring the drawings within the requirements of reasonable marine engineering practice (T.99-100). OMI called a retired Coast Guard officer, Matthew Woods, to rebut the testimony that its drawings violated Coast Guard regulations. Woods conceded, however, that "if the installation had been completed and no such [additional] supports or restraints had been provided, then it would not be in compliance with the regulation." (T.703). Woods also admitted that he did not know whether the installation ever received Coast Guard approval (T.713). OMI Port Engineer Walter Gustafson also acknowledged that the unrestrained fitting did not comply with regulations (T.806).

[6] Specifically, the drawings called for the removal of the restraint that had previously held together the two pieces of pipe that were joined by the fitting; and the drawings did not specifically indicate that the restraint had been removed and that a new restraint would have to be installed. In addition, there were no details provided as to how such additional restraints should be installed (T.57-58).

conceded that Mr. Kirby's death was attributable to the specification of the fitting at that location (T.231-32).[7]

OMI maintained that it was not negligent to utilize the fitting; that its marine engineer deliberately planned to use the fitting at that location; and that the shipyard should have known, on its own, to design and build new restraints for the pipe (T.726 *et seq.*).[8]

Mrs. Kirby acknowledged that OMI's liability was governed by federal maritime law and the Longshore and Harbor Worker's Compensation Act. However, she also contended that the Florida Wrongful Death Act provided a *remedy* for the consequences of the defendant's negligence. The plaintiff therefore requested the Florida Standard Jury Instructions for claims arising under the Florida Wrongful Death Act, Fla. Stat. § 768.16-.27 (1985). The trial judge denied the request, and, over plaintiff's objection, instructed the jury solely

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[7] OMI's Captain, Mr. Clifford, testified as follows:

> Q Do you feel that the design of that cargo line played any role in contributing to Mr. Kirby's accident?
>
> A Could I have the question again?
>
> Q Yes, sir. Do you feel that the design of that cargo line, including the dresser coupling, played any role in contributing to Mr. Kirby's accident?
>
> A I would have to say yes.
>
> Q And why is that?
>
> A I don't think the dresser coupling was adequate to use under such pressure.

(T.231-32).

[8] Following the accident, the fitting was removed and the two pipes were welded together, as plaintiff's expert witnesses testified was required from the outset by reasonable engineering practice. The trial judge excluded proffers of testimony and photographs by plaintiff seeking to establish this fact as impeachment of OMI's testimony that the fitting was appropriately specified in the OMI plans. In light of the jury's verdict for plaintiff, even in the absence of the impeachment evidence, the issue was not raised on appeal.

according to the measure of damages available under federal maritime law (T.930).

After the six day trial, the jury returned a verdict finding OMI negligent, finding Mr. Kirby 25% comparatively negligent, and assessing damages in the amount of $671,000. Several months later, the trial judge set aside the jury's verdict and entered judgment for the defendant in accordance with the previous motion for directed verdict. The trial court based its determination on *Scindia*, and ruled that there was no liability as a matter of federal maritime law (R.306-15).

On appeal, Mrs. Kirby argued that the jury should have been instructed on the measure of damages under the Florida Wrongful Death Act; and that the judgment setting aside the jury's verdict conflicted with the holding in *Scindia*. The district court of appeal's opinion conceded that Mrs. Kirby had established the defendant shipowner's negligence in preparing defective plans, 561 So. 2d at 668-69, and that the jury could have found that the shipowner's verbal changes to those plans (ordered only moments before Mr. Kirby's death) were also defective and negligently performed by the defendant. *Id.* The court then went on to hold, however, that the evidence was insufficient to establish the shipowner's liability under *Scindia*.

The district court of appeal ruled that, despite the fact that OMI's negligence included furnishing defective plans, which *preceded* delivery of the vessel to the shipyard, there could be no liability because Mr. Kirby was engaged in the work on the very lines which were the subject of the defective plans. 561 So. 2d at 669-71. The court therefore did not reach

the issue of damages.[9] The Supreme Court of Florida denied a petition for discretionary review of interdistrict conflict.[10]

REASONS FOR GRANTING THE WRIT

I.

This case presents the Court with an opportunity to resolve the important, undecided issue of whether the federal maritime cause of action for wrongful death created in *Moragne* preempts state wrongful death statutes for deaths occurring on state territorial waters.

The Court has not addressed the issue of whether, when a death occurs on territorial waters, the decedent's survivors may prosecute an action under an otherwise applicable state wrongful death act; or whether such remedies are now preempted by the general maritime cause of action for wrongful death recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Previously, in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), the Court had reaffirmed the long-standing rule that, in the absence of a remedy for wrongful death under maritime law, a death occurring on territorial waters gives rise to a claim under an applicable state wrongful death act. Four Justices dissented, however, from the Court's further holding that

> when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached.

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[9] Mrs. Kirby's motions for rehearing and rehearing en banc were denied.

[10] The petition to the Supreme Court of Florida argued that the district court of appeal's holding conflicted with Florida law requiring factual issues of proximate causation to be resolved by the trier of fact.

358 U.S. at 592. The dissenting Justices would have held that federal maritime law could employ state law to "supply a remedy" for breaches of federally imposed duties, without regard to any substantive limitations contained in the state law. *Id.* at 597.

In *Moragne*, the Court was later asked to decide whether the Florida Wrongful Death Act provided a *remedy* for a breach of an owner's duty under general maritime law (which, at the time, did not provide a cause of action for wrongful death); or rather, whether the state statute governed plaintiff's substantive cause of action (as well as the remedy).[11] Instead, the Court resolved the case by creating a new cause of action for wrongful death under maritime law:

> The extent of the role to be played by state law under *The Tungus* has been the subject of substantial debate and uncertainty in this Court, with opinions on both sides of the question acknowledging the shortcomings in the present law. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg* [119 U.S. 199 (1886) (holding that general maritime law provides no recovery for wrongful death)], and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed.

398 U.S. at 378 (citations omitted). In short, the Court avoided preemption issues by creating the new maritime cause of action for wrongful death.

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[11] Specifically, the vessel owner argued that the plaintiff's claim for unseaworthiness was not recognized as a substantive cause of action under the Florida Wrongful Death Act, and was therefore properly dismissed under *The Tungus*; the plaintiff argued that the state statute did not govern the substantive liability of the defendant, but instead provided a state law remedy for the federally recognized obligation of a vessel owner to furnish a seaworthy vessel.

Neither *Moragne*, nor other more recent decisions of the Court, provide any indication that *The Tungus* is no longer good law. Nevertheless, the Ninth Circuit Court of Appeals has held that *Moragne* does indeed preempt state wrongful death actions for deaths on territorial waters. *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980).[12]

The *Moragne* Court fashioned the new wrongful death remedy in part because of admiralty's "special solicitude for the welfare" of maritime workers, 398 U.S. at 387. Ironically, because plaintiffs now often seek to *avoid* the *Moragne* cause of action in order to obtain superior benefits under state wrongful death statutes, the preemption issue is once again of considerable significance. For example, the maritime cause of action precludes recovery for mental anguish. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). Many state wrongful death statutes, however, specifically provide that the widow and surviving children shall be allowed to recover for their mental pain and suffering. *See, e.g.*, Fla. Stat. § 768.21(2) & (3) (1985). Thus, *Moragne*, which was intended to benefit the survivors of maritime workers, now often serves to reduce the recovery that those survivors would have received under the previously enacted state wrongful death laws.

In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Court held that state courts retain concurrent jurisdiction to entertain wrongful death actions based on the

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[12] *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), *appeal after remand*, 547 F.2d 255 (5th Cir. 1977), holds that, in a case brought on the admiralty side of federal district court, *Moragne* provides the controlling measure of damages. However, the Fifth Circuit specifically declined to decide whether state wrongful death acts would continue to be applied as an alternative measure of damages in diversity, rather than admiralty, cases. 529 F.2d at 747 n.5. Therefore, the Fifth Circuit has not addressed the preemption issue of whether, in a suit such as the present case brought in state court under the "saving-to-suitors" clause, *Moragne* preempts state statutory remedies.

Death on the High Seas Act (DOHSA); and that, as to deaths *occurring beyond the territorial waters of a state*, DOHSA preempts state wrongful death statutes. In *Miles v. Apex Marine Corp.*, 59 U.S.L.W. 4001 (U.S. Nov. 6, 1990), the Court recently held that the general maritime cause of action for wrongful death does extend to the death of a seaman. However, in neither case did the Court deal with the issue of whether the general maritime cause of action preempts state wrongful death statutes for deaths occurring on territorial waters. This preemption issue affects maritime death claims litigated daily throughout the country and, we respectfully observe, merits the Court's attention.

II.

The decision below will have the practical effect of exonerating vessel owners from liability for damages caused by the owner's failure to comply with federal regulations governing the ship's plans and drawings.

Section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, as amended, 33 U.S.C. §§ 901-950 (1984), allows an injured longshoreman or ship repair worker[13] (or his survivors, if deceased) to bring a third party action against the vessel owner. Under the 1972 amendments to the LHWCA, the owner may not be held liable under an unseaworthiness theory, but is liable for damages caused by its negligence. As the legislative history of the Act makes clear, the congressional intent of the 1972 amendments was to eliminate strict liability claims by longshoremen, while providing protection against damages caused by the owner's lack of due care. S. Rep. No. 1125, 92d Cong., 2d

[13] The law governing a shipowner's duty of care for the safety of maritime workers employed by independent contractors is the same with regard to longshoremen (employed by stevedoring companies in the handling of cargo) and repair workers (employed by shipyards).

Sess. 118; H.R. Rep. No. 1141, 92d Cong., 2d Sess. 118; *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698.[14]

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[14] Historically, general maritime law imposed two duties upon the owner of a merchant vessel — the duty to use reasonable care under the circumstances; and the obligation to provide a seaworthy vessel. It has long been the law that the duty of reasonable care extends to persons injured by the owner's negligence, including longshoremen and harbor workers, and that a suit will lie in admiralty for redress of such injuries. *See, e.g., Leathers v. Blessing*, 105 U.S. 626 (1882); *The Max Morris v. Curry*, 137 U.S. 1 (1890); *The Admiral Peoples*, 295 U.S. 649 (1935); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1954) (recognizing the "unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ship can recover for damages due to the shipowner's negligence").

Although the seaworthiness doctrine had traditionally been a somewhat limited remedy, a "revolution in the law" began with the Court's holding in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), transforming the warranty of seaworthiness into a strict liability obligation. *Miles v. Apex Marine Corp.*, 59 U.S.L.W. 4001 (U.S. Nov. 6, 1990)(quoting G. Gilmore & C. Black, THE LAW OF ADMIRALTY 384, 386 (2d ed. 1975)). In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946), the responsibility to furnish a seaworthy vessel was extended beyond true merchant seamen. The Court held that the warranty of seaworthiness protected longshoremen working aboard the vessel, but employed by an independent contractor stevedore, as long as the longshoremen were performing services that were comparable to those historically undertaken by the vessel's crew. These so-called "*Sieracki* seamen" were entitled to the same benefits under general maritime law as a true merchant seaman employed by the vessel owner.

The decision in *Sieracki* led to "a burst of litigation as longshoremen availed themselves of the expansive unseaworthiness remedy whereby shipowners were held absolutely liable," 1A BENEDICT ON ADMIRALTY § 91, at 5-3 (6th ed. 1987). In turn, vessel owners sought indemnity from the stevedores, whose active negligence precipitated the longshoreman's injuries in the first instance. *See, e.g., Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). This led Congress in 1972 to amend the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, as amended, 33 U.S.C. §§ 901-950, to provide that an injured harbor worker may bring suit against the vessel owner under a negligence theory, but that there is no cause of action under a seaworthiness theory. The right of the vessel owner to seek indemnity from the injured worker's employer was also eliminated.

The law is unsettled as to the effect of a defendant's violation of an applicable statute or regulation. *See* Note, *A Review of Shipowners' Statutory Duty Under Section 905(b) of the Longshoremen's and Harborworkers' Compensation Act: Does Scindia Require a Change in Course?*, 1983 DUKE L.J. 153. In the present case, the jury was entitled to find that the defendant violated United States Coast Guard regulations when it furnished the defective plans (T.84, 157-58). Nevertheless, the district court of appeal ruled that the jury was not entitled to find the owner liable, ironically because Mr. Kirby was engaged in repairs necessitated by the defective plans at the time of the explosion. The practical effect of such a holding is to absolve a vessel owner from *any* liability for its failure to provide plans and drawings to shipyards in compliance with federal regulations (at least as long as the shipyard is engaged in correcting defects in those drawings at the time the damage ensues). The fact that this is a maritime case makes the lower court's opinion of considerably greater precedential value than it might be in another context.[15]

III.

The decision below has eroded the holding of *Scindia*, and conflicts with *Scindia*, by relieving the vessel owner from any responsibility to take reasonable precautions for the safety of longshoremen and harbor workers, before the ship is delivered to a shipyard or stevedore.

The law also remains unsettled as to when, under Section 905(b), a vessel owner may be liable for its alleged negligence which *precedes* the delivery of the vessel to the stevedore or shipyard. *Scindia*, *supra*, recognized the owner's

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[15] It is perhaps illustrative in this regard that the district court of appeal's opinion is published in American Maritime Cases immediately before this Court's decision in *Sisson v. Ruby*, 110 S. Ct. 2892, 1990 A.M.C. 1801 (1990).

liability for such negligence, but did not decide the issue or discuss it at any length. In *Scindia*, the Court was presented with the issue of whether a vessel owner had a continuing duty to inspect stevedoring operations after those operations had commenced. In considering that issue, the Court attempted to provide guidance as to the nature of conduct which will subject a vessel owner to liability. The eight participating Justices agreed that the judgment of the Ninth Circuit reversing a summary judgment for the owner should be affirmed, but divided 3-3-2 in establishing a formula for measuring the shipowner's responsibility at different stages of the cargo-handling process.

The lack of clear guidance in *Scindia* is partly responsible for the confusion among the courts regarding the standard of care to which an owner is held at the various stages of port activities. *See* 1A BENEDICT ON ADMIRALTY § 94, at 5-20 (6th ed. 1987). Nevertheless, the courts have read *Scindia* as recognizing three distinct aspects of the vessel owner's duty of reasonable care under the circumstances. *See, e.g., Woods v. Sammisa Co.*, 873 F.2d 842, 846-47 & n.4 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 853 (1990). They are:

> 1. The owner must exercise ordinary care to have the ship and its equipment in such condition that an expert and experienced stevedore (or shipyard) will be able by the exercise of reasonable care to carry on its cargo (or repair) operations with reasonable safety.
>
> 2. The owner may be liable if it actively involves itself in cargo (or repair) operations and negligently injures a longshoreman or repair worker.
>
> 3. *After* stevedoring (or repair) operations are underway, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the independent contractor's operations.

> However, the owner may be liable for such dangerous conditions if it had actual knowledge of the condition and actual knowledge that the stevedore or shipyard was not acting to correct it.

See Woods, 873 F.2d at 847 & n.4.[16]

The present case involves the first two duties: could the jury properly find the defendant liable for furnishing the ship in a dangerous condition (i.e., by furnishing defective plans); and could the defendant be liable for its active supervision of Mr. Kirby's activities moments before the explosion? The error in the lower court's analysis is that it applied the third *Scindia* test, which pertains to dangerous conditions arising after the owner relinquishes control of a vessel, to a case involving the first two types of negligence. The *significance* of the lower court's error is that it perpetuates and heightens the confusion in the law regarding the standard to be applied to conditions arising *before* the owner relinquishes control of the vessel.

In a related case involving an owner's liability for the defective stowage of cargo, three Justices recently dissented from the denial of certiorari. *Sammiline Co. v. Woods*, 110 S. Ct. 853 (1990) (White, J., dissenting, with the Chief Justice and Justice Kennedy joining). The dissenting justices would have granted certiorari to resolve a conflict between the Third and Fifth Circuits on the issue of whether a shipowner can be liable to a longshoreman who is injured while unloading a vessel, when the dangerous condition was caused by the previous defective stowage of the cargo before the plaintiff's employer began stevedoring operations.

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[16] *Scindia* dealt with a longshoreman who was injured when a pallet fell from a defective winch. The winch was part of the ship's gear; and it began malfunctioning some two days before the accident. Accordingly, *Scindia* was governed by the third duty, pertaining to dangerous conditions arising after the control of the vessel is turned over to the stevedore or shipyard.

The conflict at issue in *Sammiline* arises out of the difficulty in applying the principles of *Scindia* to cases where the vessel owner's alleged negligence is not in failing to intervene to correct a hazard which develops during in-port operations, but rather consists of failing to take adequate care *before* delivering the ship to the control of the independent contractor. The nature of the owner's liability for acts of negligence preceding its relinquishment of the vessel, left unresolved in *Sammiline*, remains unclear: when, and under what circumstances, does it apply?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1991

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In the
District Court of Appeal
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GLORIA E. KIRBY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY A. KIRBY, SR., deceased, *Appellant,* v. OMI CORP., A FOREIGN CORPORATION, *Appellee.*	CASE NO. 89-664

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

Opinion filed May 14, 1990.

Appeal from the Duval County Circuit Court, Frederick B. Tygart, Judge.

C. Rufus Pennington, III, of Margol & Pennington, Jacksonville; Christian, Prom, Korn & Zehmer, Jacksonville, for Appellant.

George D. Gabel, Jr., of Gabel, McDonald, Anderson & Dees, Jacksonville, for Appellee.

ALLEN, J.

Gloria E. Kirby, personal representative of the estate of Roy A. Kirby, Sr., deceased, sued OMI Corp. (OMI) for damages alleging that the decedent was killed as a result of the negligence of OMI. A jury found for the appellant and awarded damages, but the trial court granted OMI's post-trial motion for judgment in accordance with its motion for a directed verdict, and entered final judgment for OMI.

Ms. Kirby appeals from that judgment, contending there was sufficient legal and factual basis for the verdict. We disagree, and affirm.

OMI was the owner of the oil tanker OMI Wabash. In December of 1985, the OMI Wabash was delivered to the North Florida Shipyards (shipyard) in Jacksonville, Florida, to undergo repairs and to have a new ballast system installed. OMI furnished plans and drawings that had been prepared by Anthony Cimmino, a marine engineer. As a part of the new ballast system, Cimmino's plans called for use of a dresser coupling to connect a length of pipe to a shorter length of pipe and suction valve in the 2C tank. Although the dresser coupling had been used in this location without incident prior to the modifications, the modified pipeline was to be capped just beyond the dresser coupling and suction valve. Previously this line extended all the way to a bulkhead, where it was welded in place.

A dresser coupling is an expansion joint which connects two pieces of pipe. Although a dresser coupling has the advantage of permitting a slight amount of movement in a pipeline, it is prone to "creeping" along the pipeline, which can result in disconnection of the pipes. To prevent a dresser coupling from moving along a pipeline, stops can be attached to one end of the coupling, which fixes it to one of the pieces of pipe. This arrangement prevents creeping while still allowing for movement in the pipes. Even with stops, it is sometimes possible for the joint to separate if the pipes themselves are capable of too much movement. As a result, the pipes sometimes must be restrained in some manner.

On the morning of January 15, 1986, the ship's chief mate, John O'Boyle, inspected the pipeline in tank 2C. Upon inspection, O'Boyle determined that, as a result of the modifications, the dresser coupling was insufficient to connect the short section of pipe containing the suction valve to the longer section of pipeline. O'Boyle brought this to the attention of OMI's port engineer, Walter Gustafson. Gustafson

and the shipyard's ship superintendent, Oland Cutchin, then examined the pipeline and dresser coupling and agreed with O'Boyle's assessment. It was their opinion that stops and restraints, which had not been called for by Cimmino's plans, should be installed. Gustafson instructed Cutchin to correct the situation. Following his conversation with Gustafson, Cutchin gave instructions to shipyard employees for the stops and restraints to be installed.

A short time thereafter, Cutchin ordered that the pipelines be filled with water for a hydrostatic test. In a hydrostatic test, the pipeline is filled with water and placed under high pressure to determine whether there are leaks or weak spots in the line. At trial, the following exchange took place between Cutchin and OMI's counsel:

> [COUNSEL] Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that hydrostatic test?
>
> [CUTCHIN] No, sir.
>
> [COUNSEL] For whose benefit was the hydrostatic test to be conducted?
>
> [CUTCHIN] The test was being conducted for our benefit, to try to discover any leaks in the cargo system.
>
> [COUNSEL] Was the port engineer invited to observe the test?
>
> [CUTCHIN] No, sir.

Unknown to Cutchin, the decedent and other shipyard employees were already in the 2C tank installing the restraints when the hydrostatic test was conducted. As the workers installed the first restraint, the line suddenly blew apart at the coupling. Water gushed from the pipe with such

force that decedent was thrown through the air and fatally injured. OMI's counsel elicited the following testimony:

> [COUNSEL] Mr. Cutchin, did you know that Mr. Kirby was doing that repair at the time you made the decision to start the hydrostatic test?
>
> [CUTCHIN] No, sir. If I had of, I would not have started the hydrostatic test.
>
> [COUNSEL] And why is that?
>
> [CUTCHIN] Well, you're never supposed to hydrostatically test a line if someone is working on it. Never.
>
> [COUNSEL] As between the owner of the OMI WABASH and North Florida Shipyard, who was responsible for making sure that Mr. Kirby was not in that tank working on this pipe during the hydrostatic test?
>
> [CUTCHIN] Unfortunately, we are, North Florida Shipyard.

John Bell, a marine engineer, provided expert testimony at trial. He stated that the plans furnished by OMI "contained errors of omission that contributed to the cause" of the accident. Specifically, he said that the plans neglected to provide for restraints after the pipeline was detached from the bulkhead and capped. Other expert testimony indicated that even the restraints ordered by Gustafson and Cutchin would have been inadequate to properly secure the pipes and avoid a sudden separation under pressure.

On September 30, 1988, four days following a jury verdict in favor of appellant, OMI filed a motion for judgment in accordance with its motion for directed verdict. The trial court granted the motion on March 2, 1989. The trial court found that the ship's plans, even if defective, were not the proximate cause of decedent's fatal injuries. The court reasoned that, despite the plans, all parties had knowledge of the

defect prior to the accident Since OMI asked the shipyard to correct the defect, it could not be held liable when the shipyard's repair effort ended in injury. The court further stated:

> There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. The ship owner had no actual knowledge as to when the hydrostatic test would be conducted; it had no actual knowledge as to when the repairs were going to be made; and, therefore, it had no actual knowledge of the dangerous condition which caused Mr. Kirby's death.

Subsequently, judgment was entered in favor of OMI based on the trial court's order.

In reviewing the propriety of a directed verdict, an appellate court must view the facts and inferences to be drawn therefrom in the light most favorable to the person against whom judgment has been granted. A directed verdict can be upheld only if there is no evidence or reasonable inference from the evidence which will support the non-moving party's position. *Gant v. Lucy Ho's Bamboo Garden, Inc.*, 460 So.2d 499, 501 (Fla. 1st DCA 1984).

Before beginning our discussion of the appellant's arguments, we observe that in 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act by adding 33 U.S.C. §905(b). This provision altered the shipowner's duty to longshoremen and workers engaged in ship repair. Prior to amendment, recovery for injuries could be based upon the shipowner's warranty of seaworthiness. The amendment abolished this theory of recovery, but still provided that an injured worker could recover against the vessel for its negligence.

Appellant first asserts that the shipowner breached its duty of reasonable care by providing defective plans, and that this proximately caused her husband's death. Although the evidence is sufficient to establish that the plans were defective, it is not possible to conclude that these defects proximately resulted in the death of appellant's husband. All of the evidence demonstrates that the shipyard was aware of the defective condition, and that the shipowner instructed the shipyard to install restraints. Appellant responds by arguing that the shipowner's actions did not cure the defect because, according to expert testimony, the arrangement of restraints ordered by the shipowner would still have been insufficient had they been installed. Appellant fails to recognize, however, that the death did not occur as a proximate result of defective plans or defective modifications to plans. Rather, the fatal injuries resulted from scheduling a hydrostatic test while workers were repairing the pipeline. It was unrebutted that a test should never be conducted on a pipeline while shipyard workers are working on the same line. Thus, it is irrelevant whether the defects in the original or modified plans were cured by the shipowner's actions on the day of the accident. These actions are only relevant in that the shipyard was instructed to make repairs and that decedent was killed in the course of performing the work. Under these circumstances the shipowner is relieved of responsibility, not because of the soundness of its modifications from an engineering perspective, but based upon the well-established principle that a shipowner is not liable when a repairman is injured by the very condition he is hired to correct. *See West v. United States*, 361 U.S. 118, 123, 80 S. Ct. 189, 4 L.Ed.2d 161 (1959); *Peters v. Titan Navigation Co.*, 857 F.2d 1342 (9th Cir. 1988).

The instant case is similar to *Peters*, which involved a ship that had been converted from a natural gas carrier to a bulk products carrier. As a result of the conversion, the ship experienced repeated failures in its hydraulic system, and arrangements were made with a shipyard to effect repairs.

When the plaintiff, a shipyard worker, entered the pump room to inspect the hydraulic system, he immediately terminated the inspection when he recognized that the system had sprayed hydraulic fluid throughout the room and upon a staircase. Although the shipyard dispatched a crew to clean the room, the room had not been thoroughly cleaned when the plaintiff returned the next day. Deciding to proceed with the repairs, plaintiff slipped and injured himself when he fell down the oily staircase. Although the shipowner recognized that the conversion was inadequately performed, the court held that the shipowner could not be found liable since the plaintiff was injured by the very condition he was hired to repair. In the instant case, Mr. Kirby was killed while engaged in repair of the defective pipeline. Thus, OMI could not be found liable.

Next, appellant contends that there was a separate basis for finding OMI negligent. Appellant contends that OMI negligently failed to intervene to prevent the performance of a hydrostatic test on the pipeline while the decedent was repairing the line.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981), the Supreme Court explained the duties that §905(b) of the Longshoremen's and Harbor Workers' Compensation Act imposes upon a shipowner. The Court stated:

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

Id. at 451 U.S. 172. This applies equally to shipyard repair operations. *Hill v. Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982).

An exception to the general principle announced in *Scindia* provides that a shipowner has a duty to intervene to protect a longshoreman or shipyard worker where two conditions exist. The shipowner first must have actual knowledge of a danger on the ship, and second, must know that the stevedore or shipyard is failing to take reasonable steps to protect their workers from the danger. *See Scindia, supra* at 451 U.S. 175-176; *Casaceli v. Martech Int'l, Inc.*, 774 F.2d 1322, 1328 (5th Cir. 1985); *Futo v. Lykes Bros. S.S. Co., Inc.*, 742 F.2d 209, 214 (5th Cir. 1984); and *Murray v. Gulfcoast Transit Company*, 529 So.2d 784 (Fla. 2d DCA 1988). This exception is clearly inapplicable to the present case. All of the evidence demonstrates that the shipowner was unaware of the hydrostatic test, and was therefore in no position to intervene to prevent the accident. By way of analogy, see *Mozee v. Champion Int'l Corp.*, 554 So.2d 596 (Fla. 1st DCA 1989), and cases cited therein.

In summary, we find neither of appellant's arguments in support of reversal of the trial court's directed verdict to be persuasive. On the contrary, it appears that judgment in favor of appellee was mandated by the controlling precedents.

In light of our affirmance of the trial court's ruling on the motion for directed verdict, we need not address appellant's remaining points on appeal.

The trial court's judgment is affirmed.

BOOTH and JOANOS, JJ., CONCUR.

**IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR
DUVAL COUNTY, FLORIDA**

GLORIA E. KIRBY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY ALAN KIRBY, SR., deceased *Plaintiff,* *v.* OMI CORP., A FOREIGN CORPORATION *Defendant.*	CASE NO. 86-10500-CA DIVISION: "N"

**ORDER GRANTING MOTION FOR JUDGMENT
IN ACCORDANCE WITH MOTION
FOR DIRECTED VERDICT**

This is a maritime case arising under the provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, (hereinafter "LHWCA"), 33 U.S.C. Section 905(b). The plaintiff's decedent, Roy Alan Kirby, Sr., ("Kirby"), was an employee of North Florida Shipyard, Inc. (the "shipyard"). He died as a result of an accident on board the OMI WABASH, an ocean-going vessel owned by OMI Corp. (the "shipowner"), which was at the shipyard in Jacksonville for repairs during December 1985 and January 1986. The jury returned a verdict finding the shipowner and Mr. Kirby both negligent in the amounts of 75 percent and 25 percent respectively. Total damages were

found to be $671,000. This Court accordingly entered judgment in favor of plaintiff in the amount of $503,250, or 75 percent of $671,000. The shipowner timely moved for a judgment in accordance with motion for directed verdict under Rule 1.480, Rules of Civil Procedure, having made a motion for a directed verdict at the close of the plaintiff's case which was renewed at the close of all of the evidence. In its motion, the shipowner challenges the sufficiency of the evidence to show that the shipowner was negligent and that such negligence was a legal cause of damage to the plaintiff.

I. FACTS

The relevant facts are undisputed. The accident occurred on January 15, 1986. The vessel was at the shipyard for repairs, primarily for conversion to a segregated ballast system. The shipyard had installed a dresser coupling in the cargo pipeline in No. 2 center tank during the course of the work, and the shipowner's port engineer found the installation to be unsatisfactory. He communicated his dissatisfaction to the ship's coordinator, an employee of the shipyard, who in turn instructed the shipyard and foreman to place stops and hangers on the dresser coupling and piping. It is clear that prior to the accident all parties had knowledge that the dresser coupling did not have adequate stops and stays. Mr. Kirby was thereafter in the process of placing a hanger on the pipe when the ship's coordinator, Oland Cutchin, ordered the conducting of a hydrostatic test of the same piping on which Mr. Kirby was working. As water was forced through the pipes to conduct the test, the dresser coupling came off the pipe to which it had been affixed, and the bellmouth assembly struck and killed the plaintiff's decedent. While the port engineer and crew may have had knowledge that a hydrostatic test would ultimately be conducted, no one from the shipowner was aware that the repairs were being made at the same time

that the hydrostatic test was being conducted. In fact, Mr. Cutchin, the shipyard's coordinator, testified as follows:

> Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that repair?
>
> A: No, sir.
>
> Q: Was that entirely up to the shipyard?
>
> A: That's entirely up to the shipyard.
>
> . . .
>
> Q: Had a decision been made to or was a decision made to conduct a hydrostatic test that day on the OMI WABASH?
>
> A: Yes, sir, I made the decision.
>
> . . .
>
> Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that hydrostatic test?
>
> A: No, sir.
>
> . . .
>
> Q: Mr. Cutchin, did you know that Mr. Kirby was doing that repair at the time you made the decision to start the hydrostatic test?
>
> A: No, sir. If I had of, I would not have started the hydrostatic test.
>
> Q: And why is that?
>
> A: Well, you're never supposed to hydrostatically test a line if someone's working on it. Never.
>
> Q: As between the owner of the OMI WABASH and North Florida Shipyard, who was responsible for making sure that Mr. Kirby was not in that tank working on this pipe during the hydrostatic test?
>
> A: Unfortunately we are, North Florida Shipyard.

Q: Was there anything inherently dangerous about installing hangers or stops on that line down in the number two tank?

A: Under normal circumstances, no sir.

The only question about which reasonable men could disagree is whether the shipowner failed to provide proper plans and specifications for the modifications to be performed on the vessel by the shipyard. There was conflicting testimony as to whether the plans and specifications reflected the proper supports and restraints for the installation of the dresser coupling and whether there should have been a dresser coupling at that location at all. What the plans and specifications called for was irrelevant, however, because the shipowner's port engineer, Walter Gustafson, made it clear that the installation of the dresser coupling without supports and restraints was unsatisfactory. He testified:

Q: When you went down into the two center tank with Mr. O'Boyle and Mr. Hewitt, what happened down there?

A: The way the present installation was, it was unsatisfactory.

Q: Why was that?

A: Because there was no stops on the dresser coupling, plus - - -

Q: I'm sorry. Plus what?

A: Plus the pipe and the line, the way it was installed would require additional supports.

Q: Was it satisfactory to you to use a dresser coupling in that location?

A: Not as it was installed.

Q: Was it satisfactory to you to use a dresser coupling installed in a different manner?

A: Only if it would meet the regulations.

Q: And what regulations?

A: Coast Guard regulations.

Q: Do you know specifically what regulations pertain to use of dresser couplings on cargo lines?

A: Yes.

Q: What are they?

A: The piping has to be properly supported and stops have to be installed.

. . .

Q: When you say the pipe would have additional support, are you talking about connecting steel from the pipe to some other location?

A: To the structure of the vessel, yes.

It is undisputed that whatever defect there may have been in the plans and specifications was called to the shipyard's attention and that the repairs in progress at the time of the accident were being made by the shipyard because the shipowner's port engineer had rejected the existing work as unsatisfactory. He specifically required that the coupling and pipe have supports and restraints before the work would be accepted, which were the very elements that plaintiff alleged were missing from the plans furnished by the shipowner to the shipyard.

II. APPLICABLE LAW

Prior to 1972, an injured longshoreman or harbor worker could recover against the vessel owner if he could prove that he had been injured as a result of the unseaworthiness of the vessel. Under this broad standard, the vessel owner was liable even if the unsafe condition had been created by the stevedore or other marine contractor. In 1972,

Congress amended the LHWCA, substituting negligence for unseaworthiness as the shipowner's standard of care. Under the present standard, the vessel owner is liable only for the failure of the vessel or its owner to exercise reasonable care. 33 U.S.C. Section 905(b).

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981), the Supreme Court of the United States outlined the duties a shipowner owes to a contracting stevedore and its longshoremen. Specifically, the Court stated that the shipowner is entitled to rely on the stevedore's judgment unless the shipowner becomes aware and has actual knowledge of a hazard on the ship and that the stevedore is unreasonably failing to protect the longshoremen against that hazard, at which time it has a duty to intervene and remedy the hazard.

The rationale of *Scindia* is not limited to stevedoring operations and applies to a shipyard and its harborworker employees working aboard the ship. *Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir., 1985), at pages 1326 and 1327. In the context of repair operations, however, a vessel owner's duty to the shipyard and its workers is subtly altered. *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879 (5th Cir., 1983), at page 882. The Supreme Court of the United States in *West v. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L.Ed.2d 161 (1959) stated:

> "It appears manifestly unfair to apply the requirements of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The [shipowner], having hired [the shipyard] to perform the overhaul and reconditioning of the vessel — including the testing — was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract."

Id. at 123, 80 S. Ct. at 193.

The Plaintiff argues that the shipowner was negligent in furnishing defective drawings to the shipyard and that such negligence proximately contributed to cause Mr. Kirby's death, but regardless of what was provided for in the plans all parties had knowledge that the dresser coupling did not have adequate stops and stays. The facts in the case of *Peters v. Titan Navigation Co.*, 857 F.2d 1342 (9th Cir., 1988), are similar to the facts in this case. In *Peters*, the defendants had performed conversion repairs on the ship's hydraulic system, and the shipyard was contracted to repair the defect in the system. The defendants in *Peters* conceded that they had been negligent in creating the defect, but the court held that the defendants were not liable for the injuries because the Plaintiff was injured by a defective condition he was hired to correct. Similarly, in the present case, the plaintiff alleges that the shipowner's plans and specifications contained a defect. The evidence is conflicting as to whether the plans were defective. Nonetheless, the owner's port engineer refused to accept the work and the job that was to be performed by the shipyard was to correct the defect. The court in *Peters* stated the applicable principles involved: (a) a vessel owner is not liable for damages inherent in carrying out the repair contract, (b) there is no negligence liability when a repairman is injury by the very condition he is hired to repair, and (c) an employee cannot recover for injuries received while doing an act to eliminate the cause of injury.

The *Peters* case relies upon *West v. United States*, supra, the principal case dealing with the liability of a shipowner while his vessel is at a shipyard, a case which contains facts strikingly close to the ones here. In *West*, an end plug from a one-inch pipe in the water system was propelled through the top of the open cylinder and hit the plaintiff's knee when another employee of the shipyard turned on the water without warning, and the plug was forced off, hitting the plaintiff.

The Supreme Court of the United States said at 4 L.Ed.2d 165:

> There was no hidden defect in the water system. It was one of the objects to be repaired and its plugs were to be replaced where necessary. Its testing was to be done by the contractor . . . not by the shipowner.

The rule in *Scindia* is discussed in the case of *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir., 1983), at page 1039, which reiterates that a shipowner has no duty to discover a condition or to anticipate its danger, the critical questions being (a) whether the shipowner knew of the dangerous condition *and* (b) whether it knew that the shipyard was not adequately protecting its employees. The court makes the following statement at page 1043:

> Prior to the decision of the United States Supreme Court in *Scindia Steam Navigation Co. v. De Los Santos*, this Circuit held a vessel owner liable under 33 U.S.C. Section 905(b) for injuries to a longshoreman from open and obvious dangers if the owner knew, or if he should reasonably have foreseen, the dangerousness of the condition. *Scindia* makes clear, however, that liability in such cases can be imposed only if the owner has actual knowledge of the dangerous condition as well as actual knowledge that the stevedore is not acting to protect the longshoreman.

Similarly, the court in *Casaceli v. Martech Intern., Inc.*, 774 F.2d 1322 (5th Cir., 1985), in discussing the *Scindia* case stated at pages 1327 and 1328:

> . . . *Scindia* imposed liability on the vessel owner for an employee's injuries occurring after unloading operations began if they "result[ed] from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he

> cannot rely on the stevedore to remedy the situation. He is not held to a duty to discover the condition or to anticipate its danger. . . .

In *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879 (5th Cir., 1983), the court discusses the *Scindia* principles as they apply to a vessel owner's duties while its vessel is at a shipyard. At pages 882 through 885, the court states:

> In the context of repair operations, however, a vessel owner's duty to the shipyard and its workers is subtly altered. The courts have long recognized that the vessel owner has no duty to deliver his ship to the shipyard in a hazard-free condition, when the requested repairs would remedy the hazards which cause the injury.
>
> . . .
>
> After *De Los Santos*, this Court has continued to recognize these principles in a shipyard situation.
>
> . . .
>
> Finally, [the vessel owner] has not transgressed the *De Los Santos* requirement that the shipowner intervene to protect a longshoreman when the vessel knows of an unsafe condition that the stevedore (or shipyard) is improvidently failing to guard the worker against. There is no evidence in the record that ACL had "actual knowledge" of the hazardous condition which arose.

There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. The shipowner had no actual knowledge as to when the hydrostatic test would be conducted; it had no actual knowledge as to when the repairs were going to be made; and,

therefore, it had no actual knowledge of the dangerous condition which caused Mr. Kirby's death.

An excellent discussion of what constitutes "actual knowledge" of the shipowner is found in the case of *Futo v. Lykes Bros. S.S. Co., Inc.*, 742 F.2d 209 (5th Cir., 1984).

The point is made clear by the court in *Helaire* that the vessel owner can be held liable for injuries to employees of the shipyard "only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on the [shipyard] to remedy this situation." 709 F.2d 1038 and 1039. [Emphasis in original].

The most that can be said from the evidence in the present case is that the ship's port engineer had knowledge that repairs would be performed and that ultimately a hydrostatic test would be conducted, but the evidence is undisputed that the port engineer did not know *when* the repairs would be performed nor *when* the hydrostatic test would be conducted, and was not aware that they would be performed and conducted at the same time. The scheduling of the repairs and the hydrostatic test were entirely up to the shipyard. The Plaintiff in essence is arguing that the shipowner, based upon facts which it either knew or should have known, had a duty to anticipate the dangerous condition, *i.e.*, that the repairs would be performed and the hydrostatic test conducted at the same time. The court in *Helaire*, however, at page 1039 stated:

> [The vessel owner] is not held to a duty to discover the condition or to anticipate its danger.

There was nothing inherently dangerous about performing the repairs. The shipyard's coordinator emphatically stated that if he had known Mr. Kirby was performing the repair at the time the coordinator made the decision to start the hydrostatic test, he would not have started the test. While it was

dangerous to perform the repairs at the same time the hydrostatic test was being conducted on the same line, the court in *Futo* stated at page 220:

> Knowledge that the condition of an object renders it dangerous *if* used in a particular way or under particular circumstances does not of itself necessarily evidence the requisite knowledge of actual danger.

Even if the shipowner had a duty to discover the dangerous condition which was being created by the shipyard (a duty which it did not have), the second requirement in *Scindia* and *Helaire* could never be met, since the shipowner could not know that the shipyard was not adequately protecting Mr. Kirby from a dangerous condition about which it had no knowledge in the first place. Thus, the Court concludes as a matter of law that the shipowner breached no duty that it owed to the plaintiff's decedent.

It is, therefore,

ORDERED AND ADJUDGED:

1. The Motion for Judgment in Accordance with Motion for Directed Verdict is granted, and judgment will be entered accordingly for the defendant, OMI Corp.

2. The Court reserves jurisdiction to enter an order taxing costs.

DONE and ORDERED in Chambers at Jacksonville, Duval County, Florida, this 1st day of March, 1989.

_____

CIRCUIT JUDGE

Copies:

C. Rufus Pennington, III, Esquire
Rodney S. Margol, Esquire
George D. Gabel, Jr., Esquire
J. Carol McDonald, Esquire

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

GLORIA E. KIRBY, AS PERSONAL REPRESENTATIVE *Appellant(s),*	June 15, 1990
v.	CASE NO. 89-00664
OMI CORP., A FOREIGN CORPORATION *Appellee(s).*	L.T. CASE NO. 86-10500-CA

ORDER

Plaintiff/Appellant's motion for rehearing and motion for rehearing en banc, filed May 24, 1990, is DENIED.

By order of the Court

RAYMOND E. RHODES
Clerk

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

C. Rufus Pennington George D. Gabel, Jr.

_____
Deputy Clerk

Supreme Court of Florida
Thursday, October 18, 1990

GLORIA E. KIRBY, etc., *Petitioner,* v. OMI CORPORATION, etc., *Respondent.*	CASE NO. 76,313 DISTRICT COURT OF APPEAL, 1ST DISTRICT NO. 89-664

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., MCDONALD, EHRLICH, BARKETT and KOGAN, JJ., concur

A True Copy

TEST:

Sid J. White, *Clerk,*
Supreme Court

By: Deputy Clerk

H

cc: Hon. Raymond E. Rhodes,
Clerk
Hon. Henry W. Cook,
Clerk
Hon. Frederick B. Tygart,
Judge

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Rodeny S. Margol, Esquire
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Zehmer, P.A.,

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 90-1128

In The

Supreme Court of the United States

October Term, 1990

GLORIA E. KIRBY,

Petitioner,

v.

OMI CORP.,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 15, 1991

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QUESTIONS PRESENTED

1. Whether the conclusion of the Florida First District Court of Appeal that a shipowner cannot be held liable when a repairman is injured by the very condition he is hired to correct warrants further review.

2. Whether this Court's time is warranted in reviewing a decision that does not exonerate vessel owners from liability for damages caused by the owner's alleged failure to comply with federal regulations governing the ship's plans and drawings.

3. Whether the issue of federal maritime law pre-emption of state wrongful death statutes for deaths occurring on state territorial waters is properly raised at this time absent a finding of vessel liability; or whether the issue raises a significant question meriting this Court's attention absent any decisions inconsistent with the clear precedent established in holdings of this Court.

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STATEMENT OF THE CASE

This is a maritime wrongful death action applying maritime law pursuant to § 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1984). Petitioner, the widow of a shipyard worker, brought an action against Respondent, OMI Corp., claiming vessel negligence which allegedly caused fatal injuries incurred by her husband while he was making repairs to the vessel OMI WABASH.

OMI Corp., is the owner of the OMI WABASH. At the time of the injury to Petitioner's decedent, Roy A. Kirby, Sr., OMI Corp. had relinquished control of the OMI WABASH to North Florida Shipyards, Inc. pursuant to a contract for vessel repairs and the installation of a new ballast system. (T. 595)[1] Mr. Kirby was employed by the shipyard as a pipefitter.

The evidence at trial showed that the OMI WABASH was the last of five ships[2] owned by OMI Corp. to undergo substantially identical modifications to their segregated ballast systems at North Florida Shipyards. (T. 718-720). The specifications provided to the shipyard for the OMI LEADER, the first ship modified, were the specifications used on all the vessels including the OMI WABASH. (T. 718-719). While these plans were reasonably specific, the OMI LEADER's specifications were adapted

---

[1] T. ___ refers to the Trial Transcript.
PP. ___ refers to Petitioner's Petition for Writ of Certiorari.

[2] The five ships were the OMI LEADER, OMI WILLIAMETTE, OMI CHARGER, OMI CHAMPION, and the OMI WABASH. (T. 720).

"on-site" for the subsequent vessels. (T. 721). OMI's Port Engineer, Walter Gustafson, remained with the vessel to ensure compliance with the plans and specifications and to make any changes to the plans that were needed on an individual ship basis. (T. 289). The plans and specifications provided to the shipyard had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard and had been approved on behalf of the U.S. Coast Guard by the American Bureau of Shipping. (T. 192-193) (See Appendix).

Petitioner alleges that the plans called for an incorrect type of pipe fitting in a particular location and that the shipyard performed the modifications as required by the plans. (PP. 5). However, the Record shows that the plan's requirements were modified by the shipyard itself prior to the date of the accident when it elected to install an elbow joint rather than a T-joint as called for in the plans at the location where the accident occurred. (T. 610). The Record also shows that four days before the accident, the shipyard had inspected its work at this particular location and had found its own work inadequate. (T. 609-614). The shipyard had delegated the responsibility for correcting its work to Mr. Kirby and another shipyard employee. (T. 614). At the time of the accident, these corrections had not been made. (T. 611-612).

On the morning of the accident, OMI's Port Engineer inspected the shipyard's installation of the pipe fitting and found it unacceptable. His dissatisfaction was communicated to the shipyard's coordinator, Oland Cutchin, an employee of the shipyard, who in turn directed certain shipyard employees to perform the requested repairs. (T.

635, 785). The requested repairs were assigned to Mr. Kirby and another shipyard worker. (T. 396, 397-398). The responsibility for assigning and scheduling the repairs belonged to and remained with the shipyard. No one from OMI Corp. assumed the responsibility for assigning, scheduling, or supervising the work of the repairs. (T. 639). The repair work was in progress when Mr. Cutchin ordered the hydrostatic testing of the piping system on which Mr. Kirby was working. (T. 639-644).

There is no testimony in the record, as Petitioner suggests, that indicates that a hydrostatic test on the lines had already been started when OMI rejected the installation and requested the needed repairs. Neither is there any testimony in the record that supports Petitioner's statement that OMI's Port Engineer remained to supervise the requested changes. (T. 403-404). In fact, Petitioner had an opportunity to call the only witness who could attest to this statement, but failed to do so.

After a jury verdict finding vessel negligence, the trial court granted Respondent's Motion for Judgment in Accordance With Directed Verdict. Even though there was conflicting evidence regarding whether the plans OMI Corp. submitted to the shipyard were defective, the trial court stated:

> There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. *Kirby v. OMI Corp.*, 1989 AMC 1079 at 1085.

In affirming the trial court's judgment, the Florida First District Court of Appeal found that all of the evidence demonstrated that the shipyard was aware of the defective condition of the pipe restraint prior to the accident. *Kirby v. OMI Corp.*, 561 So.2d 666 (Fla. 1st DCA 1990). With this knowledge, the court stated that it was not possible to conclude that the plans furnished by OMI Corp. had caused Mr. Kirby's injuries. *Id.* Even if OMI Corp.'s instructions to the shipyard to correct the plans had been inadequate, the court concluded that the shipowner's actions still had not caused Mr. Kirby's death. Rather, his fatal injuries occurred as a result of the shipyard's scheduling a hydrostatic test while workers were repairing the pipeline. *Id.* In making this determination, the court relied on the following unrebutted testimony by Mr. Cutchin, the shipyard's ship coordinator:

> "Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that repair?
>
> A: No, sir.
>
> Q: Was that entirely up to the shipyard?
>
> A: That's entirely up to the shipyard."
>
> . . .
>
> Q: Had a decision been made to or was a decision made to conduct a hydrostatic test that day on the OMI WABASH?
>
> A: Yes, sir. I made the decision. . . .
>
> Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that hydrostatic test?
>
> A: No, sir.

. . .

Q: Mr. Cutchin, did you know that Mr. Kirby was doing that repair at the time you made the decision to start the hydrostatic test?

A: No, sir. If I had of, I would not have started the hydrostatic test.

Q: And why is that?

A: Well, you're never supposed to hydrostatically test a line if someone's working on it. Never.

Q: As between the owner of the OMI WABASH and North Florida Shipyard, who was responsible for making sure that Mr. Kirby was not in the tank working on this pipe during the hydrostatic test?

A: Unfortunately we are, North Florida Shipyard.

Q: Was there anything inherently dangerous about installing hangers or stops on that line down in the number two tank?

A: Under normal circumstances, no sir. (T. 639-644).

Relying on this Court's decision in *West v. United States*, 361 U.S. 118 (1959), and the decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342 (9th Cir. 1988), the District Court of Appeal concluded that a shipowner is not liable when a repairman is injured by the very condition he is hired to correct. 561 So.2d at 670.

Analyzing the shipowner's duty to intervene and prevent the hydrostatic test, the court held that under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the shipowner had no duty to intervene in the

repair operation absent actual knowledge that a hydrostatic test would be conducted on the pipeline at the same time it was being repaired. 561 So.2d at 670. The court found that "all of the evidence demonstrated that the shipowner was unaware of the hydrostatic test and was therefore in no position to intervene to prevent the accident." *Id.*

Finding no liability for vessel negligence, the District Court of Appeal did not reach Petitioner's other points on appeal. One of the issues not reached was Petitioner's argument that the trial court erred in failing to give a Florida Standard Jury Instruction for claims arising under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985). Petitioner argued that while maritime substantive law applied to issues of liability, Petitioner's remedy in damages should be governed by the provisions of the Florida Wrongful Death Act. In so arguing Petitioner and her dependents presumably would have been entitled to recover for mental pain and suffering, an element of damages not recoverable under general maritime law.

The Supreme Court of Florida declined to review the decision of the Florida First District Court of Appeal.

SUMMARY OF ARGUMENT

I.

The Florida First District Court of Appeal correctly upheld the trial court's directed verdict based on this Court's decisions in *West v. United States*, 361 U.S. 118 (1959) and *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Nothing novel is presented in

the lower court's application of the facts to the law of *West* or *Scindia*, nor does the lower court's decision conflict with these decisions.

Petitioner alleges conflict with *Scindia* because she incorrectly identifies the dangerous condition that caused the decedent's injuries. The dangerous condition was not the arguably defective plans, but rather the shipyard's scheduling of a hydrostatic test of a pipeline at the same time the Petitioner's husband was making repairs to that pipeline.

The OMI WABASH had been turned over to a shipyard for repairs and the installation of a new ballast system. Respondent had submitted plans approved for compliance with Coast Guard regulations which Petitioner argued were defective. Unrebutted testimony at trial showed that the alleged defect in the plans had been recognized prior to decedent's injuries, and decedent's employer had been asked to correct the defect. Thus, the District Court of Appeal held as irrelevant any question of a duty arising prior to control of the vessel being relinquished to the shipyard. Having hired the shipyard to repair, modify and test the vessel's ballast system, the vessel owner was under no duty to protect a shipyard worker from risks that were inherent in carrying out the contract. 361 U.S. at 123.

The vessel owner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop once the vessel is turned over to the shipyard. *Scindia*, 451 U.S. at 172. An exception to this rule exists only if the shipowner had actual knowledge of a danger on the ship and is aware

that the shipyard is not taking reasonable steps to protect its shipyard workers from this dangerous condition. 451 U.S. at 175-176. Unrebutted evidence at trial demonstrated that the vessel owner did not know when the repairs would be performed nor when the hydrostatic test would be conducted, and was not aware that they would be performed and conducted at the same time. Applying the *Scindia* standard, the District Court of Appeal correctly found that the shipowner had no duty to intervene to prevent the hydrostatic test.

II.

The plans and drawings submitted to the shipyard had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard by the American Bureau of Shipping on behalf of the Coast Guard. (See Appendix). While the opinion concedes that there was sufficient evidence to allow a jury to conclude that the plans were defective, the opinion does not indicate or discuss whether non-compliance with federal regulations made the plans defective. In any event, the opinion below holds that defective plans did not cause decedent's injuries. The decision, therefore, could not have the effect of exonerating vessel owners from liability for damages allegedly caused by the failure to comply with federal regulations governing the vessel's plans and drawings.

III.

Petitioner states that federal maritime law should be applied in this maritime wrongful death action, but argues that the trial court incorrectly denied Petitioner's

request for a jury instruction on the measure of damages under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985). The District Court of Appeal did not reach this issue because no liability was found. Absent liability, Respondent suggests that Petitioner is merely asking this Court for an advisory opinion on this issue and review of the issue is not warranted. In any event, Petitioner presents no convincing evidence of the issue's importance. Review by this Court is not warranted where clear and unconflicting precedent on this issue exists in state and federal courts.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Respondent submits its argument to this Court by addressing issues in a different order from their presentation in the Petition for Writ of Certiorari. Petitioner acknowledges that Respondent's liability is governed by federal maritime law and the Longshore and Harbor Workers' Compensation Act. (PP. 7). However, Petitioner's first issue addresses the question of damages only, a question Respondent suggests is moot absent a finding of liability. Accordingly, Respondent first addresses Petitioner's issues regarding liability for alleged vessel negligence.

A. Section 905(b) Shipowner Liability in a Ship Repair Context

Petitioner posits a conflict with *Scindia Steam Navigation Co. v. De Los Santos, supra,* which is non-existent. Her

assertion that the decision of the Florida First District Court of Appeal relieves the vessel owner of *any responsibility* to take reasonable precautions for the safety of harborworkers prior to the vessel's delivery to a shipyard is unwarranted hyperbole. (PP. 14) Petitioner's argument ignores the law upon which the lower court's opinion is based, and the significant factual distinction between the cargo handling operations involved in *Scindia* and the ship repair context of the present case. Petitioner's argument also ignores the negligence-based principles upon which the opinions of both *Scindia* and the District Court of Appeal rest.

The 1972 Amendments to the Longshore and Harbor Workers' Compensation Act statutorily codified a longshoreman's right to recover for negligence, but it did not expand or change the existing negligence cause of action a longshoreman could bring against a vessel. 451 U.S. 156, 165. A maritime tort action in negligence, like its land-based counterpart, must show (1) existence of a duty; (2) breach of that duty; and (3) damages proximately caused by the duty's breach. The duty owed in a maritime negligence action is one of reasonable care under the circumstances. 451 U.S. at 163 n. 10. This Court in *Scindia* did not change that duty. Rather, using land-based tort principles, this Court helped to further define the duty owed by a vessel owner to a longshoreman in a negligence cause of action brought under the LHWCA.

Petitioner incorrectly states that the District Court of Appeal's decision conflicts with *Scindia*. It does not conflict with *Scindia* but follows the holding in that case. In addition, the decision below relies on another and more

factually similar decision of this Court. *Scindia* involved a vessel owner's liability in cargo loading and unloading operations. The present case differs subtly, but significantly from *Scindia*, in that it involves a vessel owner's liability in a ship repair context. With this distinction, the District Court of Appeal correctly looked to the Court's decision in *West v. United States*, 361 U.S. 118 (1959), to help determine the duty owed by a vessel owner in a ship repair context.

In *West*, like the present case, a vessel had been turned over to a shipyard for an overhaul. One of the specifications of the contract was to clean, repair, and test all water lines including the replacement of plugs and other parts. A shipyard worker was injured by one of the plugs when another shipyard worker turned on the water without warning, forcing off the loose plug, a case almost identical to the one here. In denying vessel owner liability, the Court held that a vessel owner, having hired a shipyard to recondition and test a vessel, was under no duty to protect a shipyard worker from risks that were inherent in carrying out the contract. 361 U.S. at 123. The Court stated:

> It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic [shipyard] to perform the overhaul and reconditioning of the vessel – including the testing – was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. 361 U.S. at 123.

Likewise in the present case, the OMI WABASH had been turned over to the shipyard for modifications. One of the specifications called for replacement and modification of the existing ballast system. The decedent was injured while making the required modification.

The decedent was not injured by defective plans or any condition existing prior to the vessel's delivery to the shipyard. The Petitioner's decedent was fatally injured when the shipyard initiated a high pressure, hydrostatic test of the same line that the decedent was simultaneously repairing. The lower court found that even if the vessel owner delivered defective plans to the shipyard prior to relinquishing control of the vessel, the shipowner had cured that defect by its actions on the day of the accident. By refusing to accept the shipyard's work and requesting that the shipyard make the needed changes to properly restrain the pipe fitting, the defective plans became irrelevant. The Florida appellate court stated:

> [T]he death did not occur as a proximate result of defective plans or defective modifications to plans. Rather, the fatal injuries resulted from scheduling a hydrostatic test while workers were repairing the pipeline. It was unrebutted that a test should never be conducted on a pipeline while shipyard workers are working on the same line. 561 So.2d at 669.

The court below thus applied a duty, breach, proximate cause analysis based on *West* and *Scindia*. The *West* Court acknowledged that under certain circumstances a shipowner could incur pre-delivery liability in a ship repair context for a latent or hidden defect. 361 U.S. at 124. However, this Court in *West*, like the District Court

of Appeal in the present case, found no latent defect and held that a shipowner cannot be liable when a repairman is injured by the very condition he is hired to correct. 561 So.2d at 669.

In addition, the present case presents no conflict with other circuits under similar factual circumstances. The Ninth Circuit Court of Appeals in *Peters v. Titan Navigation Company*, 857 F.2d 1342 (9th Cir. 1988), reached a similar result when a ship repairman was injured in the course of making repairs to a hydraulic system that had been negligently installed prior to its delivery to the shipyard for needed modifications.

The court below applied the principles established in *Scindia* when analyzing Petitioner's additional argument that Respondent should be held liable for failing to intervene to prevent the hydrostatic test on the pipeline being repaired. 561 So.2d at 670. The decision below did not "erode Scindia" or conflict with this Court's definition of the standard of care owed by a vessel owner to a longshoreman. On the contrary, the lower court applied this Court's reasoning in *Scindia*:

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. 451 U.S. at 172.

A shipowner has a duty to intervene to protect a longshoreman, according to *Scindia*, only if the shipowner has actual knowledge of a danger on the ship and is aware

that the stevedore is not taking reasonable steps to protect the longshoreman from this danger. See *Scindia, supra,* at 451 U.S. 175-176; *Casaceli v. Martech Int'l, Inc.,* 774 F.2d 1322, 1328 (5th Cir. 1985); *Futo v. Lykes Bros. S.S. Co., Inc.,* 742 F.2d 209, 214 (5th Cir. 1984). The Florida First District Court of Appeal found that a Florida court had similarly applied this law citing to *Murray v. Gulf Coast Transit Company,* 529 So.2d 784 (Fla. 2d DCA 1988).

Unrebutted evidence in the court below demonstrated that the vessel owner was unaware of the hydrostatic test. 561 So.2d at 670. The trial court stated:

> There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. The shipowner had no actual knowledge as to when the hydrostatic test would be conducted; it had no actual knowledge as to when the repairs were going to be made; and, therefore, it had no actual knowledge of the dangerous condition which caused Mr. Kirby's death. 1989 AMC at 1085.

Applying the *Scindia* test, the District Court of Appeal correctly found that the shipowner had no duty to intervene to prevent the hydrostatic test. 561 So.2d at 670.

Petitioner compares the present case to *Sammiline Co. v. Woods,* 110 S.Ct. 853 (1990), in which this Court denied certiorari. However, in denying certiorari, this Court noted a conflict between the Third and Fifth Circuits concerning the duty owed a longshoreman for injuries caused by the defective storage of cargo. In making this

comparison, Petitioner again ignores significant factual differences between the present case and the issues as presented in *Sammiline*. The duty a shipowner owes to a longshoreman prior to relinquishing control of a ship to a shipyard as in the present case, or prior to commencing stevedoring operations as in the *Sammiline* case, is irrelevant under the facts of the present case. The decision of the Florida District Court of Appeal, based on unrebutted evidence, held that the alleged pre-delivery defect in the plans had been cured prior to the decedent's accident; and the decedent's injuries were not caused by any defect in the plans.

The determination of the Florida First District Court of Appeal is correct and does not conflict or erode this Court's decisions in *West* or *Scindia*. There is nothing novel in the lower court's application of the law in *West* and *Scindia* to the facts of the present case. The lower court's decision, therefore, does not merit review by this Court.

B. Effect of Alleged Non-Compliance With Federal Regulations in § 905(b) Actions

Evidence presented at trial indicated that the plans provided to the shipyard by the Respondent had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard by the American Bureau of Shipping on behalf of the Coast Guard. (T. 192-193) (See Appendix). Petitioner therefore greatly exaggerates the practical effect the lower court's decision would have on vessel owner liability for failure to comply with federal regulations governing the ship's plans. In fact, while the

opinion concedes that there was sufficient evidence to allow a jury to conclude that the plans were defective, the opinion does not indicate or discuss whether non-compliance with federal regulations made the plans defective.

Even more significant in a determination of the opinion's effect on this issue is the false premise on which Petitioner bases her argument. Petitioner argues that the plans submitted to the shipyard by the vessel owner created a dangerous condition which should subject the vessel owner to liability for decedent's injuries. Petitioner ignores the fact that the dangerous condition was not created by any alleged failure to comply with federal regulations, but by the shipyard's initiating a high pressure, hydrostatic test on the same cargo line upon which the decedent was simultaneously making repairs. 561 So.2d at 669.

The opinion simply does not hold or in any way indicate that a vessel owner is exonerated from all liability for damages caused by the owner's failure to comply with federal regulations governing the vessel's plans and drawings. There is nothing novel about the lower court's decision that warrants review by this Court.

C. State Wrongful Death Statute Pre-Emption

Petitioner acknowledges that Respondent's liability was to be determined by federal maritime law and the Longshore and Harbor Workers' Compensation Act. Curiously, however, Petitioner argues that the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985), should provide the measure of damages for the consequences of any negligence. (PP. 7). This issue does not arise until

liability is found. For that reason, the District Court of Appeal did not reach this issue. This Court's review of the issue would amount to an advisory opinion without a judgment of liability. Absent that judgment, review by this Court is inappropriate.

Nonetheless, Petitioner asks this Court to deal with the issue of whether the federal maritime cause of action for wrongful death created in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), pre-empts state wrongful death statutes for deaths occurring on state territorial waters. Petitioner bases the significance of the pre-emption issue not on any extensive cited or irreconcilable conflict in state or federal law, but on the continued validity of *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

Petitioner asserts that *Moragne* did not provide any indication that *The Tungus* is no longer good law. The *Moragne* decision indicates otherwise. In *Moragne*, the petitioner attacked the findings in *The Tungus* in the court of appeals but not in the trial court. In ruling that her challenge to *The Tungus* was properly before this Court on certiorari, this Court stated:

> Her challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg*, upon which *The Tungus* rests. 398 U.S. at 345 n. 3.

This Court went on to say that the parties addressed themselves to the question of whether *The Harrisburg*, 119 U.S. 199 (1886), should be overruled but in so doing the parties fully addressed *The Tungus*. *Id.* It thus seems clear that this Court was looking at both *The Harrisburg* and *The Tungus* when it created the federal maritime cause of

action for wrongful death, and did not avoid the preemption issue as Petitioner suggests.

Petitioner also seems to argue that if *Moragne* preempts the application of state wrongful death statutes to maritime death actions, it does so in contradiction to one of the reasons the *Moragne* Court fashioned the new wrongful death remedy. That reason being, according to Petitioner, a "special solicitude for the welfare of maritime workers." (PP. 11). But Petitioner misstates this Court's basis for "fashioning" the new maritime wrongful death remedy in *Moragne*. While a "special solicitude for men who undertake to venture upon hazardous and unpredictable sea voyages" is recognized by the *Moragne* Court as a general principle of maritime law, the Court did not base its decision on this principle. It is clearly stated:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts . . . Such uniformity will give effect to the constitutionally based principle that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly in, the whole country'. 398 U.S. 375 at 401 (quoting) *The Lottawanna*, 21 Wall 558, 575 (1875).

In *Miles v. Apex Marine Corporation*, 59 U.S.L.W. 4001 (U.S. November 6, 1990), this Court recently reaffirmed the importance of a system of maritime law operating uniformly in the whole country. A system of law that

would allow a shipyard worker to use substantive maritime law as a basis of liability and state law as a measure of damages would run counter to the rationale and theory clearly stated in *Miles, Moragne* and *The Lottawanna.*

In fact, *Moragne* anticipated that the issue of the measure of damages would become a part of its general maritime wrongful death remedy, but left it to the lower courts to fashion. 398 U.S. at 361. In *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), it was subsequently decided what the measure of damages should be in a maritime wrongful death claim. The award of damages for mental anguish or grief was specifically excluded. 814 U.S. 585 at n. 17.

The Court has permitted state law to supplement maritime law only in areas where maritime law does not conflict with state law. *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372 (1918); *Southern Pacific v. Jensen,* 244 U.S. 205 (1917). Permitting a state wrongful death act to supplement and/or change the measure of damages to be recovered under the general maritime law would destroy any uniformity in the general maritime law. This principle has been applied in wrongful death actions by federal courts sitting in admiralty and diversity, and in state courts under the savings to suitors-clause of 28 U.S.C. § 1333 (1949).

The Ninth Circuit, in *Evich v. Morris,* 819 F.2d 256 (9th Cir.) cert. denied, 484 U.S. 914 (1987), and *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980), has held that *Moragne* pre-empts state wrongful death actions for deaths on territorial waters. In *Matter of S/S Helena,* 529 F.2d 744 (5th Cir. 1976), the Fifth Circuit held "that the wrongful death remedy provided by [*Moragne*] precludes recognition in

admiralty of state statutes". *Id.* at 753. A footnote in *S/S Helena* suggests that the court did not decide if *Moragne* pre-empted state wrongful death statutes in maritime wrongful death cases brought under a federal court's diversity jurisdiction. *Id.* at 748 n. 5. This issue was specifically addressed in *Neal v. McGinnis*, 716 F. Supp. 996 (E.D. Ky. 1989). In *Neal*, a seaman slipped, fell and drowned in the Ohio River during the course of his employment as a deck hand. His Jones Act claim was settled. However, his widow had also asserted a claim against a third party under general maritime law invoking the federal court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. In the diversity action, the seaman's widow argued that a federal court acting in diversity must apply state law rather than general maritime law. The court disagreed, citing *Chelentis* and *Kermarec v. Compagnie Generale Transatlantic*, 388 U.S. 625 (1958), and held that regardless of whether a maritime claim is brought pursuant to the court's admiralty jurisdiction on its diversity jurisdiction, the parties' rights and liabilities are controlled by federal principles of maritime law. The *Neal* court also extended this rationale to maritime claims brought in state courts. 716 F.Supp. at 999.

Further, when maritime wrongful death actions have been brought in state court, the courts in New York, Maryland and Missouri have held that their state wrongful death acts are pre-empted by the general maritime wrongful death law. See, *Scholl v. Town of Babylon*, 466 N.Y.S.2d 976 (A.D. 2 Dept. 1983) (crabber killed when struck by a pleasure boat in state territorial waters); *Jong Hee Park v. U.S. Lines, Inc.*, 439 A.2d 10 (Md. App. 1982) (longshoreman killed when crane he was operating was

blown off deck by bad weather); *Sanders v. Richmond*, 579 S.W. 2d, 401 (Mo. App. 1979) decedent killed when two motor boats collided on Mississippi River).

While this issue was briefed below, the District Court of Appeal did not reach this question and did not discuss it in its opinion. The decision by the trial court to deny a Florida Standard Jury Instruction for claims arising under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985), is entirely consistent, if not compelled, by the decisions of this Court and does not conflict with the decisions of any other federal or state court. With this clear precedent, Petitioner has presented no evidence of the issue's importance and no convincing reason for this Court to review the trial court's disposition of this issue. In any event, since there is no liability, the issue is irrelevant.

CONCLUSION

None of the issues raised by the Petitioner merits review by certiorari. Because the alleged defect in the plans had been corrected by the shipyard prior to the decedent's injuries, the shipowner breached no duty to the decedent prior to relinquishing control of the OMI WABASH to the decedent's employer. Neither did the plans proximately cause decedent's fatal injuries. Any issue relating to the plan's compliance with federal regulations is irrelevant absent a duty owed the decedent and the lack of proximate causation. Finally, the pre-emption issue is moot absent a finding of liability. In any event, absent any evidence of the issue's significance in light of

clear and unconflicting precedent, the issue does not merit review by this Court.

For these reasons and the well considered opinion of the Florida First District Court of Appeal, the petition should be denied.

Respectfully submitted,

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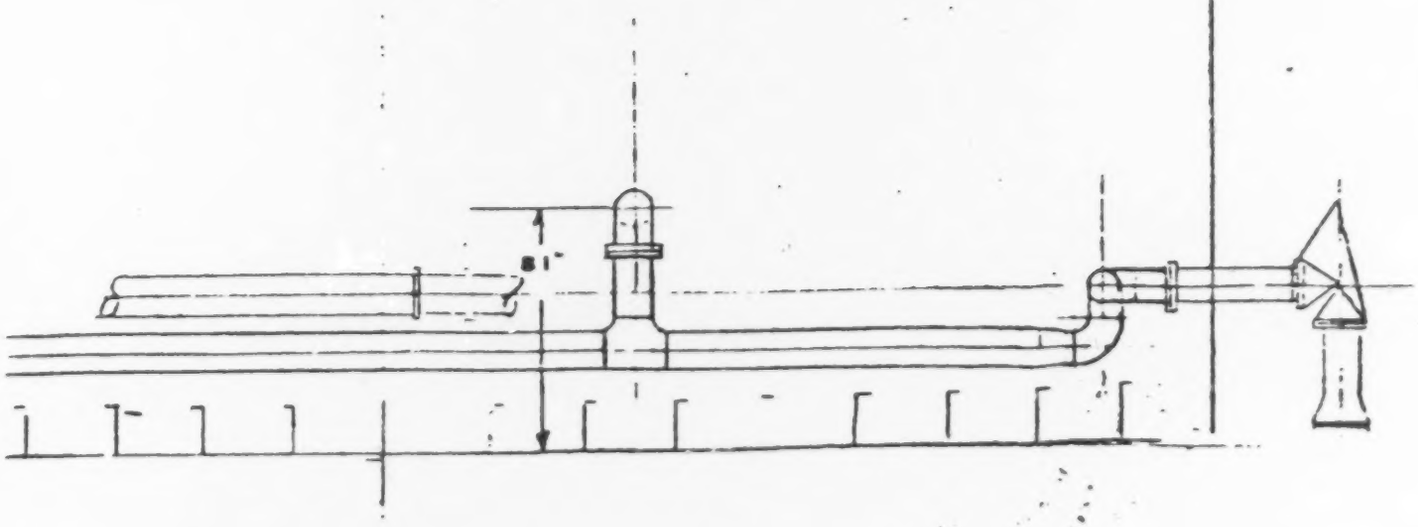
APPENDIX

CARGO TANKS 2 P/C/S



SECTION, FRAME 176 LOOKING AFT

REVIEWED FOR COMPLIANCE WITH
USCG REGULATIONS IN
ACCORDANCE WITH NVC 10-82

APPROVED
SUBJECT TO
COMMENTS IN
ABS LETTER DATED
18 JUN 1985
W M. MANNAN
VICE PRESIDENT
AMERICAN BUREAU
OF SHIPPING
NEW YORK
BY DIRECTION

Filed in Evidence
as
Plaintiff's
Exhibit 21 A Date 9/19/88
Case 86-10500 CA

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PLAINTIFF'S
EXHIBIT
For Identification

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